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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Carriage Abstract, Inc.

File: B-290676; B-290676.2

Date: August 15, 2002

Alfred J. Verdi, Esq., for the protester.

Richard A. Marchese, Esq., Department of Housing and Urban Development, for the agency.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's award of contracts to three small businesses, without consideration of protester's large business offer, is unobjectionable where the awards were made in accordance with solicitation terms providing a cascading set-aside preference for small business awards, without consideration of any large business offer received, where two or more competitive offers were received from qualified small business concerns.

DECISION

Carriage Abstract, Inc. protests the award of three contracts to small business concerns under request for proposals (RFP) No. R-PHI-00851, issued by the Department of Housing and Urban Development (HUD) for real estate closing agent services related to the sale of HUD-owned single-family residences in Maryland. Three contracts were contemplated under the RFP—one for each of three geographic regions—for a base year and two option periods. Carriage, a large business and the incumbent provider of the required services, contends that the agency was required to consider its proposal and that, in not doing so, the agency improperly awarded contracts to small business offerors in excess of fair market prices.

We deny the protest.

As a matter of background, the current requirement is a procurement of services initially solicited as a total small business set-aside procurement, under which a contract had been awarded to Carriage. That procurement was cancelled, however, due to a successful size status protest filed with the Small Business Administration

(SBA) by another firm, and Carriage's unsuccessful appeal of that decision. The current solicitation also was initially issued as a small business set-aside. Shortly after issuance, however, the solicitation was amended to instead provide a cascading set-aside preference for awards to small businesses only where sufficient small business competition is received. Specifically, the RFP provided the following "set-aside award" terms:

(a) All potential offerors may submit proposals for any or all of the geographic areas specified in . . . this solicitation.

(b)(1) In accordance with [Federal Acquisition Regulation (FAR)] Subpart 19.8, any award(s) for a geographic area covered by this solicitation will be made on a competitive basis to eligible Section 8(a) business concerns, provided that a minimum of two (2) competitive offers are received from eligible Section 8(a) business concerns for the geographic area.

(2) If a minimum of two (2) competitive offers from eligible Section 8(a) concerns are not received, any award(s) for a geographic area covered by this solicitation will be made on a competitive basis to eligible small business concerns in accordance with FAR Subpart 19.5, provided that a minimum of two (2) competitive offers are received from eligible small business concerns for the geographic area.

(3) If a minimum of two (2) competitive offers from eligible small business concerns are not received, any award(s) for a geographic area covered by this solicitation will be made on the basis of full and open competition from among all responsible business concerns submitting offers for the geographic area.

RFP § M-5, amend. 1, at 5.

The closing date for receipt of proposals was August 3, 2001. The agency received 11 small business proposals; the 2 submitted by section 8(a) concerns were determined to be technically unacceptable. Five of the small business proposals were found technically acceptable, but one of them was considered to be unreasonably high-priced, so it was not considered further. Most of the four remaining competitive proposals provided offers for more than one of the three geographic areas to be awarded; accordingly, each area offered was considered as a separate offer. Considering the small business prices received, Carriage's historical pricing of \$220 per closing, and comparable market pricing in government markets (and higher prices for private markets), the agency determined that reasonable pricing for awards under the RFP would fall within the range of prices submitted by the majority of small business offerors (ranging from \$200 to \$286 per closing).

Citing the “best value” terms for award under the RFP, where technical factors were to have greater weight than price, the agency determined that an award would be made for each of the three geographic areas to those firms whose proposals offered the best value to the government among the offers received from eligible small businesses for each geographic area. For area No. 1, the contract price was awarded at \$250 per closing; for area No. 2, the contract price was \$200; and for area No. 3, the contract price was \$250. Notice of the awards was sent to the protester on May 23, 2002; that notice explained that, because sufficient small business competition had been achieved under the RFP, no large business proposals were considered for award.

Following a debriefing, Carriage filed this protest with our Office challenging the agency’s award of the contracts without first considering the protester’s large business proposal as offering the best value to the agency. In support of its contention that its proposal had to be evaluated prior to award, the protester argues that its proposal was competitive, in terms of price and technical merit, citing Federal Acquisition Regulation (FAR) § 15.305(a), which provides in part that the contracting agency is to evaluate “competitive proposals” and then assess their relative qualities based on the evaluation factors in the solicitation. Further, since Carriage’s historical price of \$220 is lower than the award price (\$250) under two of the contracts awarded under the RFP, the protester contends that the agency’s failure to consider its proposal resulted in the award of those contracts (for area Nos. 1 and 3) to small businesses in excess of fair market prices.¹ See FAR § 19.502-2(b) (providing that a total small business set-aside shall not be made unless there is a reasonable expectation that award will be made at a fair market price).

¹ Carriage raises additional issues that we have considered, but have determined do not warrant further review due to procedural deficiencies or legal insufficiency. For example, although the protester contends that the agency failed to notify Carriage at the time of the small business proposals’ evaluations that large businesses would not be considered for award, and thus did not give Carriage prompt notice that it was excluded from the competitive range, the protester simply has not demonstrated that it has suffered any prejudice from the timing of the agency’s notice of the firm’s exclusion from the competition—its challenge to its exclusion is currently receiving the same review as Carriage states it would have pursued had it been informed earlier of the agency’s failure to consider large business proposals. To the extent the protester suggests that the agency should have considered a partial set-aside award to allow part of the overall requirement to be awarded to large businesses, the contention is untimely—the RFP did not contemplate a partial set-aside approach. Allegations of improprieties in a solicitation must be raised prior to the closing time for the receipt of proposals under the solicitation. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2002).

In response to the agency's concerns as to the timeliness of the protest, Carriage confirms that it is not challenging the cascading set-aside preference terms of the RFP. Rather, Carriage contends that, despite those terms, its proposal should have been evaluated because of its alleged technical merit and favorable price. The protester, however, has not identified any requirement, nor are we aware of any, that the agency must consider the protester's large business proposal for award under the cascading set-aside preference terms of the RFP.

Specifically, although the protester points out that an agency may review a large business proposal submitted under a cascading set-aside preference, Carriage has provided no legal support for its contention that the agency is required to do so. In fact, in the case cited by the firm as support for such a requirement, Wilson 5 Serv. Co., Inc., B-285343.2; B-285343.3, Oct. 10, 2000, 2000 CPD ¶ 157 at 2-3, even though the contracting agency had initially reviewed all of the proposals received under that solicitation, including those from large businesses, all of the large business proposals were, as here, excluded from further consideration once a determination was made that sufficient small business competition had been achieved under the procurement.

Our Office has found no reason to question similar cascading set-aside preference provisions used by HUD for certain real estate services. HUD has explained that such an approach promotes the interests of small business concerns and also provides the agency with an efficient means to continue the procurement in the event that sufficient small business participation is not realized. HUD explains that the cascading set-aside approach was formulated in conjunction with, and has been endorsed by, the SBA. See The Urban Group, Inc.; McSwain and Assocs., Inc., B-281352, B-281353, Jan. 28, 1999, 99-1 CPD ¶ 25 at 7. The cascading set-aside preference provision used in the RFP here reasonably put large businesses on notice that, if the agency receives a sufficient number of eligible small business offers, large business proposals received simply would not be considered for award. See id. As such, the cascading set-aside preference terms establish, at best, only a potential for participation of large businesses in the competition for award.

Here, since an adequate number of eligible small business proposals were received, we find reasonable the agency's conclusion that Carriage's large business proposal was not a "competitive proposal" for award, and thus, under the terms of this competition, was not entitled to the comparative evaluation sought by the protester under FAR § 15.305(a).

The protester contends that its proposal must be considered by the agency in order to properly assess fair market prices for the services. The RFP's cascading set-aside terms, however, do not require such consideration--in fact, as stated above, large business proposal review is not contemplated where sufficient small business competition has been achieved. The protester argues that, since its historical pricing is slightly lower than the prices under two of the awarded contracts, the agency must consider its historical pricing to determine reasonable pricing for the services. As

stated above, however, Carriage's historical pricing was considered in the price analysis and the agency found that it in fact supported its conclusion regarding the reasonableness of the prices received from the small businesses, as Carriage's historical price fell squarely within the range of prices deemed reasonable by the agency.

In its supplemental protest filed several weeks after its initial protest, Carriage argues for the first time that the evaluation of all of the small business proposals was flawed. As support for its suspicion of impropriety, the protester argues that, since, according to Carriage, the contracting officer should have known that one of the awardees is unfit to perform the required services, the evaluation of any other proposal conducted during the competition must be deficient. We find this allegation legally insufficient to constitute a valid basis of protest. Clearly, an argument against the evaluation of one firm's eligibility, even if meritorious, provides insufficient basis upon which to demonstrate, as the protester suggests, widespread improprieties in the evaluation of all of the other small business proposals. In any event, the allegation is untimely—the protester knew the identity of the challenged awardee for over a month before the supplemental protest was filed, and the information about the firm which Carriage now puts forth as supposed evidence of widespread evaluation improprieties in this procurement was publicly available at the time Carriage learned of the award. A protester has the affirmative obligation to diligently pursue the information that forms the basis for its protest. Horizon Trading Co., Inc.; Drexel Heritage Furnishings, Inc., B-231177, B-231177.2, July 26, 1988, 88-2 CPD ¶ 86 at 7-8. Since Carriage has not shown that it expeditiously

pursued the information in the supplemental protest, we view the protest as untimely filed in any event.² Illumination Control Sys., Inc., B-237196, Dec. 12, 1989, 89-2 CPD ¶ 546 at 2.

The protest is denied.

Anthony H. Gamboa
General Counsel

² We also find unpersuasive Carriage's strained argument that its supplemental protest allegation of an improper evaluation of all small business proposals should be considered timely because it is encompassed by the firm's initial protest of the agency's flawed evaluation. Our review of the initial protest confirms that the submission does not raise the issue of the agency's evaluation of the small business proposals; the initial protest instead focused on the agency's failure to consider the protester's proposal. In confirmation of this, we note that the protester itself, elsewhere in the record, characterizes its own initial protest as challenging "only the post submission miscalculation of its own proposal," and states that "the crux of the protest was the summary exclusion" of that proposal, not the evaluation of the small business proposals received by the agency. Letters from Carriage to GAO, June 30, 2002, at 1, and July 29, at 2 (emphasis added).